

IOSH Edinburgh – Legal Update

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Introduction

- Sentencing Guidelines – 1 year on
- Case Update
 - Prosecution of companies
 - Prosecution of individuals
 - Corporate Manslaughter and Corporate Homicide
- Fee For Intervention - proposals for change
- Upcoming developments
 - new Guidelines regarding reduction in sentence for early plea
 - Impact of Brexit

Sentencing Guidelines – 1 year on



Sentencing Guidelines

- Applies to all health and safety offences
 - Organisations; and
 - Individuals
- Applies to Corporate Manslaughter
- Based on 3 key factors:
 - Turnover, not profit
 - Culpability
 - Level of harm **risked**
 - “causation” less important than it was before

Sentencing Guidelines

- Mandatory in England and Wales from 1 February 2016
- Fines have risen significantly
 - Total number of fines imposed over £1m = 15.
 - Average fine £695,940.78*
- Very large companies fall outside the ranges in the Guidelines

* For all Large and Medium sized companies prosecuted between 1 February 2016 and 31 December 2016

Sentencing Guidelines - Scotland

- Guidelines not directly applicable in Scotland.
- Court of Appeal considered the application of the Guidelines in Scotland:
 - “there is no need to use [the Guidelines] in a mechanistic or formulaic fashion...”
 - “guidelines from the Sentencing Council will often provide a useful cross check, especially where the offences are regulated by a UK statute...”
- Court in Scotland should make its own assessment of appropriate sentence and, only then, use guidelines as cross-check if thought appropriate

Sentencing Guidelines – the approach

- **Step one** – Determine offence category: harm and culpability
- **Step two** - Starting point – is the company micro, small, medium or large (or very large) based on turnover
- **Step three** – is proposed fine proportionate
- **Steps four to nine** – consider other factors that might require adjustment including credit for guilty plea

Fines post-1 Feb 2016

- **Very large**

- Travis Perkins – £2m (May 16) – fatal
- Tata Steel - £1.98m (July 16) – non fatal
- Network Rail - £4m (Sept 16) – fatal
- Tarmac Trading - £1.3m (Oct 16) – fatal

- **Large**

- G4S Cash Solutions - £1.8m (Sept 16) – non injury
- Decco - £2.2m (Sept 16) – fatal
- Merlin Attractions - £5m (Sept 2016) – non fatal
- Cristal Pigment UK - £3m (Nov 2016) – fatal



Sentencing Guidelines 2016 - Individuals

- Determine the offence category:
 - Culpability
 - **Very high** - intentionally breached or flagrant disregard for the law
 - **High** – actual foresight of or wilful blindness to risk, and risk taken
 - **Medium** - an act or omission that a person exercising reasonable care would not do
 - **Low** – little fault i.e. minor error of judgment

Individuals

- Similar 9-step approach based on culpability & risk of harm

	Starting point	Category range
Very high culpability		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
High culpability		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
Medium culpability		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
Low culpability		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine



Case Update - organisations



Merlin Attractions Operations Ltd

- **Facts**

- 16 people injured on Smiler Rollercoaster at Alton Towers following a collision between two carriages
- Two young women required a leg amputation
- Maintenance engineers deactivated ride's control system without sufficient training in risks of doing so
- 4 to 5 hours before emergency services were able to bring people down from suspension at 45 degree angle 20 feet in the air

- **Turnover: £413m**

- **Profit before tax: £75m**

- **Fine: £5m**

Tarmac Trading

- **Facts**
 - One man killed and another seriously injured while crossing Queens Drive in Liverpool.
 - Temporary traffic lights not working and no alternative provided.
 - Tarmac trading was responsible for installing traffic and pedestrian management.
- **Turnover:** £2bn
- **Profit before tax:** £120.5m
- **Fine:** £1.3m

G4S Cash Solutions

- **Facts:**
 - Employee contracted legionella
 - No evidence that cause linked to G4S' premises
 - Hot and cold water systems badly managed
 - Inadequate policies, monitoring and testing, and inadequate training for staff
 - Failure to act on advice of own consultant
- **Turnover:** £240m
- **Profit before tax:** £43m
- **Fine:** £1.8m

Cristal Pigment UK

- **Facts:**
 - 2010: toxic vapour cloud released. One worker killed and another seriously injured. Cloud shuts down shipping lanes on the river Humber.
 - HSE: “Had the wind been blowing in the opposite direction it could also have caused a local disaster”.
 - 2011: second uncontrolled release of toxic vapour during cleaning. No one injured.
- **Turnover:** £197m
- **Profit before tax:** £5.97m
- **Fine:** £3m

Case Update - individuals



Kenneth Thelwall (s.37)

- **Kenneth Thelwall**, Director, Thorne Warehousing Limited
- Sentenced to **12 months imprisonment**, ordered to pay costs of £4,000 and disqualified from acting as a director for 7 years
- August 2016 plea of guilty to s.37 relating to a fatal incident:
 - On 29 January 2014, Paul Williamson, 51, was fatally injured when the spider lift he was loading overturned on him as he walked alongside with the remote controller.
 - Mr Williamson had not been adequately trained, there was no risk assessment in place and no safe system of work had been created for the equipment.
- Company was fined £166,000 plus £10,400 costs. The company is currently in administration.
- Mr Thelwall had previously pled guilty to a breach relating to another incident in 2009 which resulted in the death of employee Bernard Rowson, who was crushed to death by a metal gate.

Donald Craig

- Facts
 - Craig Services & Access Limited hired out lifting equipment.
 - 2011 – Main Boom 3 of a cherry picker buckled while in use. No-one injured and cause of the failure never investigated.
 - Craig Services instructed a repair to the damaged section of the main boom. The repair was incorrectly carried out and an adequate thorough examination was not carried out.
 - 2012 – Main Boom 3 of the cherry picker buckled while in use. One person killed, another injured.
- Donald Craig (manager of Craig Services) sentenced to **2 years'** imprisonment.
- Craig Services fined £61,000
- JM Access Solutions fined £30,000

Corporate Manslaughter and Corporate Homicide Act 2007 – an update



Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced statutory manslaughter offence for organisations
- In force – 6 April 2008
- 30 cases to date
 - 25 in E&W / 5 in NI / 0 in Scotland
- Of that:
 - 23 convictions (7 trials; 16 guilty pleas)
 - 5 acquittals
 - 2 on-going case

Corporate Manslaughter and Corporate Homicide Act 2007

- Prosecution must prove the way in which activities were managed or organised:
 - Caused a person's death;
 - Amounts to a **gross breach** of a relevant duty of care owed to the deceased; and
 - **Senior management's** role in the breach was a substantial element in the breach

Corporate Manslaughter – sentencing guidelines

Large organisation Turnover more than £50 million		
Offence category	Starting point	Category range
A	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

Medium organisation Turnover £10 million to £50 million		
Offence category	Starting point	Category range
A	£3,000,000	£1,800,000 – £7,500,000
B	£2,000,000	£1,200,000 – £5,000,000

Small organisation Turnover £2 million to £10 million		
Offence category	Starting point	Category range
A	£800,000	£540,000 – £2,800,000
B	£540,000	£350,000 – £2,000,000

Micro organisation Turnover up to £2 million		
Offence category	Starting point	Category range
A	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000

Fee for Intervention



Fees For Intervention (FFI)

- Health and Safety and Nuclear (Fees) Regulations 2016 came into force on 6 April 2016.
- Introduced a 4% fee increase in fees payable to (in most cases) the HSE.
- FFI now £129 per hour
- HSE's Annual Report and Accounts 2015/16 – income from FF1 £14.7m but cost of recovery £17.5m!



Changes to FFI

- Appeals process the subject of Judicial Review
- HSE to consult on proposals to make its cost recovery scheme dispute process fully independent.
- Proposed new process will likely be in place by 1 September 2017.
- HSE have proposed that the new dispute process will be determined by a panel completely independent of HSE chaired by an independent lawyer.

Upcoming developments



Upcoming Developments

- Companies entitled to recover fines from H&S consultants? (*D Geddes v Neil Johnson Health & Safety Services Limited* [2017] CSOH 42)
- New Guidelines in England and Wales
 - **Reduction in Sentence for a Guilty Plea** Full (1/3) credit available where plea is “indicated at first stage of proceedings” **not** the first reasonably opportunity as is presently the case.
- Brexit
 - Unlikely that UK health and safety law would be subject to drastic change, especially if the country was to remain in EFTA and the EEA.



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